

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3431

JEAN JONES,

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS

Appellee.

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APPELLANT'S REPLY ARGUMENT

- I. **The Secretary is incorrect in asserting that the presumption of regularity had not been rebutted even though the Board of Veterans' Appeals conceded that the Veteran was not properly notified of her appellate and procedural rights following the October 1978 deferred or confirmed rating decision that denied entitlement to TDIU.**

The Secretary "concedes that the record does not include a copy of the notice letter associated with the October 1978 decision or notice of appellate rights." Secretary's Br. at 9. The Secretary states, nonetheless, "even if the record contained this, it would still be necessary to rely on the inference that the notice of the rating decision and appellate rights were, in fact, mailed to Appellant with the rating decision." *Id.* (citation omitted). The Secretary's argument should be rejected by the Court.

The Secretary argues that "[t]he October 20, 1978 Adjudication Worksheet (VA Form 21-6747) infers that a rating decision was mailed to Appellant at her address in Anaheim, California and to her representative." Secretary' Br. at 9. The Secretary goes on to state that there is no evidence of record suggesting "that Appellant did not receive the rating decision." Secretary's Br at 9-10. The Secretary fails to appreciate the fact that the adjudication worksheet is merely a draft document, and it does not have any resemblance of an actual decision. R-1181.

The Secretary is attempting to fill in gaps in the record by relying on the presumption of regularity that a decision was actually made, Mrs. Jones was notified

of the purported decision, and she received her appellate rights. The Secretary mistakenly presumes that the October 20, 1978, VA form 21-6747 was a rating decision. It was not a decision. The Secretary is trying to “effectively insulate the VA’s errors from review whenever it fails to fulfill an obligation, but leaves no firm trace of its dereliction in the record.” *Bond v. Shinseki*, 659 F.3d 1362, 1368 (Fed. Cir. 2011).

The record also contains a VA Form 21-6796, Rating Decision, dated December 1, 1978, and stamped “TO DPC, January 02 1979, FOR FILE.” R-1180. The form also appears to be a draft, and not the final version, because it only contains shorthand notations. *Id.* Even if this copy is the final version, the shorthand notations do not provide enough information for a lay person to understand the outcome of the decision. *Id.* The record does not contain any other versions of this form or any other rating decisions from this time period.

The issue in this case is not merely “an assertion of nonreceipt” of the letter by the Veteran, which “standing alone does not rebut the presumption of regularity in VA’s mailing process.” *See Jones v. West*, 12 Vet.App. 98, 102 (1998). The October 1978 VA form 21-6747 is not an actual decision and the December 1978 rating decision is simply a draft. Therefore, it would be unlikely that notice of appellate rights were ever sent to the Veteran. Given the lack of evidence of notice of appellate rights as the Board concedes, the Court should find that there is “clear evidence to the

contrary” that the presumption of regularity has been rebutted and the Veteran was not properly notified of the October 1978 adjudication worksheet or the December 1978 rating decision, to include notification of her appellate rights. *See Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004).

The foregoing establishes that there is clear evidence to the contrary that VA did not properly discharge its duties by notifying the Veteran of the rating decision and her appellate and procedural rights. *See Stbele v. Principi*, 19 Vet.App. 11, 17 (2004) (holding that “the 120-day appeal period regarding that Board decision did not begin to run until the Secretary demonstrated that the decision was mailed to the appellant at his last known address or that the appellant actually received a copy of the decision”). As such, the Court should reverse the Board’s legal conclusion that Mrs. Jones has not rebutted the presumption of regularity. The Secretary’s arguments to the contrary should be rejected by the Court.

II. The Secretary is incorrect that the October 2000 claim did not include a request for TDIU. The question of entitlement to TDIU is not a freestanding claim, is always raised in the context of a claim for an increased rating, and the record shows the Veteran was unemployable due to her service-connected disabilities at that time of her October 2000 claim.

The Secretary notes that the Veteran “argues the Board failed to apply the correct legal standard under *Rice v. Shinseki*, 22 Vet.App. 447 (2009), when it determined the October 2000 claim for increased ratings did not include a claim for TDIU.” Secretary’s Br. at 11. But the Secretary asserts that Mrs. Jones “does not

explain, and the Secretary cannot decipher, any basis for concluding the October 2000 claim reasonably raises the issue of unemployability.” Secretary’s Br. at 12. The Secretary’s argument that TDIU was not reasonably raised by the record should be rejected by the Court.

The Secretary is attempting to hold Mrs. Jones to a different legal standard in arguing that TDIU was not raised by the record. The correct legal standard as to whether TDIU is reasonably raised is that the veteran must make a claim for the highest rating possible, submit evidence of a medical disability, and submit evidence of unemployability. *See Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). The Secretary focuses too narrowly on the actual claim filed in October 2000 rather than the record as a whole.

To that end, the November 2000 VA examination that was conducted in conjunction with the October 2000 increased-rating claim reasonably raised the question of entitlement to TDIU. *See* R-1146-50. First, the examiner noted Mrs. Jones “was not working” at the time of the examination and that she had not worked since 1974. R-1147. Additionally, the symptoms enumerated in the examination report raised the question of entitlement to unemployability benefits. *See Rice v. Shinseki*, 22 Vet.App. 447, 453 (2009). Specifically, the Veteran reported: “horrible” pain that is “present all the time;” weakness; stiffness; recurrent subluxation; swelling; inflammation; instability; locking; fatigue; and lack of endurance. R-1146. The

examiner noted that the Veteran was “limited in cooking, walking, grocery shopping and vacuuming,” as well as driving a car. R-1146-47. In addition, “she [was] unable to take out the trash cans, push the lawn mower, do gardening or climb stairs due to pain in the ankle and knee.” R-1147. Therefore, the fact that the Veteran was not working, combined with the symptoms enumerated above showing her pain and functional limitations, the November 2000 VA examination reasonably raised the question of entitlement to TDIU.

Nonetheless, the Secretary indicates that “there is no opinion provided regarding Appellant’s ability to engage in activities of employment, nor does Appellant associate her unemployment with her unemployment with her service-connected disabilities.” Secretary’s Br. at 13-14. Again, the Secretary is holding the Veteran to a higher legal standard as to whether TDIU is reasonably raised by the record. As explained herein, to reasonably raise TDIU, a veteran must make a claim for the highest rating possible, submit evidence of a medical disability, and submit evidence of unemployability. *See Roberson*, 251 F.3d at 1384; 38 C.F.R. § 3.155(a). The Veteran did precisely that in conjunction with her October 2000 claim: (1) she sought the highest possible for her service-connected disabilities; (2) she was service connected for right knee and left ankle disabilities; and (3) and the Veteran last worked in 1974, was still unemployed at the time of her October 2000 claim, and the symptoms

enumerated above showing her pain and functional limitations due to those disabilities.

The foregoing evidence reasonably raised the Veteran's potential entitlement to TDIU in conjunction with her October 2000 increased rating claim. The Board's failure to recognize this requires that its decision be vacated. The Board, and now the Secretary, utilized the incorrect legal standard when it determined that TDIU was not raised. The Secretary's argument to the contrary should be rejected by the Court.

CONCLUSION

For the foregoing reasons, as well as the reasons in the opening brief, the Court should reverse the Board's legal conclusion that Ms. Jones has not rebutted the presumption of regularity. The Court should hold that the 1967 and 1978 decisions were not final and that the issue of TDIU remained open and pending until VA ultimately awarded TDIU. The Court should remand the appeal with an instruction to readjudicate the appeal in accordance with the foregoing discussion and the Court's decision.

In the alternative, the Board erred when it found the October 2000 claim did not include a claim for TDIU and could not serve as the basis for an earlier effective date because the question of entitlement to TDIU is not a freestanding claim. The question of TDIU is always raised in the context of a claim for an increased rating and the record shows the Veteran was unemployable due to her service-connected

disabilities at that time. Therefore, in the alternative, the Board's decision should be remanded with instructions to properly apply the holdings in *Rice*, 22 Vet.App. at 453, and to properly consider the evidence raising entitlement to TDIU in the November 2000 VA examination.

Respectfully submitted,
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By Her Representatives,
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